DATE: JULY 2, 1997
CASE NO. 95-INA-415

In the Matter of:

META ENGINEERS, P.C.
Employer

On Behalf of:

PATROCINIO OLIVAS PERET
Alien

APPEARANCE: Winston W. Tsai, Esq.
For the Employer

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of Unite States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and

the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On July 18, 1994, the Employer, Meta Engineers, P.C., filed an application for labor certification to enable the Alien, Patrocinio Olivas Peret, to fill the position of Electrical Engineer. The job duties for the position, as stated on the application, are as follows:

> The Electrical Engineer provides lighting and power design for various projects under the direction of a project engineer and the Chief Electrical Engineer. Other duties may include research, cost analysis and field surveys.

(AF 106).

The stated requirements for the position were initially as follows: a B.S. degree in Electrical Engineering; and, two years of experience in the job offered (AF 106). The application, however, reflects that the experience requirement was subsequently reduced to 6 months (AF 106).

The CO issued a Notice of Findings on February 23, 1995, proposing to deny certification on the grounds, inter alia, that the Employer had rejected qualified U.S. applicants for other than lawful job-related reasons, and failed to show that the job opportunity is clearly open to qualified U.S. workers. See 20 C.F.R. §656.21(b)(6) and §656.20(c)(8). (AF 70-73).

The Employer submitted its rebuttal on or about March 29, 1995 (AF 32-35). The CO found the rebuttal unpersuasive regarding the rejection of various U.S. applicants and issued a Final Determination on April 13, 1995, denying certification (AF 27-31).

On May 15, 1995, the Employer appealed the denial of certification (AF 1-26), and subsequently the CO forwarded this matter to the Board of Alien Labor Certification Appeals for review. The Employer's brief has been received and considered.

Discussion

An employer must show that U.S. applicants were rejected solely for lawful job-related reasons. 20 C.F.R. §656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. §656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications.

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such good faith requirement is implicit. H.C. LaMarche Enterprises, Inc., 87-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their

applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and available" to perform the work. 20 C.F.R. §656.1.

In the report of recruitment results, dated December 16, 1994 (AF 54), and attachments thereto, the Employer indicated that it had considered the qualifications of 25 applicants (AF 56-58), but found none of them qualified, willing, and able. The Employer stated, in pertinent part:

> After reviewing the forwarded resumes, we found that generally most of the applicants do not possess our requirement of six (6) months power and lighting design experience. Each applicant was notified individually (copies and certified mail receipts enclosed). Few of them responded as mentioned in the attached list of applicants but they were not able to prove qualified for the position.

(AF 54).

In the Notice of Findings, the CO stated, however, that the Employer had rejected seven qualified U.S. applicants; namely, McKinnon, Biswas, Sathisram, Rao, Strongin, Young, and Dao (AF 38-39). The CO noted that the foregoing U.S. applicants were purportedly rejected on the following grounds: No experience in power and lighting design; No experience in CADD application; Did not respond to our letter dated October 17, 1994 prior to the position being filled; and/or Unable to prove qualified for the position. Yet, the CO found that the foregoing applicants, in fact, had the required experience in power and lighting design and in CADD. Furthermore, the CO found that the Employer's letter, dated October 17, 1994, contained language which would discourage applicants from pursuing the job opportunity. Finally, the CO stated that the Employer had failed to provide any explanation regarding what it meant by its statement that certain applicants "were unable to prove qualified for the position." The CO noted that the burden of proof is on the Employer to show that there are no U.S. workers who are able, willing, qualified, and available for the job opportunity and that the U.S. applicants were rejected for lawful, job-related reasons (AF 38-39).

The Employer's "rebuttal" includes a letter, dated March 29, 1995, signed by Paul E. MacDonald, its Chief Electrical Engineer, which states, in pertinent part: "We have made a bonafide effort to recruit a qualified U.S. worker, but such person is not able, willing and available to work for us." (AF 74). This bare assertion is repeated in a cover letter, dated March 29, 1995, by Employer's counsel (AF 32). In the Final Determination, the CO stated that the Employer had failed to address this issue, and that such failure is deemed an admission (AF 10-11).

Although a written assertion constitutes documentation, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Gencorp, 87-INA-659 (Jan. 13, 1988)(en banc); A.V. Restaurant, 88-INA-330 (Nov. 22, 1988); Carl Joecks, Inc., 90-INA-406 (Jan. 16, 1992).

In the Notice of Findings, the CO specifically listed seven U.S. applicants who were rejected by the Employer, but who appeared to be qualified based upon their resumes. Rather

than provide documentation, or even an explanation, as to why its recruitment report was accurate, and the CO's conclusions were erroneous, the Employer provided a cursory, unsubstantiated, generalized statement that it found no U.S. workers who are able, willing, qualified, and available for the job. We find that such a statement is entitled to no weight.

Finally, we decline to consider any new evidence or argument submitted by the Employer with its request for review, because such evidence and argument should have been raised prior to the issuance of the Final Determination, and, is not part of the record on appeal. Francisco Potestas, 94-INA-204 (Apr. 26, 1995); Memorial Granite, 94-INA-66 (Dec. 23, 1994).

In view of the foregoing, we adopt the CO's determination that the Employer has failed to adequately document that the seven U.S. applicants cited in the Notice of Findings were not qualified, willing or available at the time of initial referral. Therefore, we find that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002